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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 734

WILLIAM WRIGHT,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

REPLY TO BRIEF OF UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States:

1.

A vital concession is made by Government counsel at page four of their brief. This is with respect to the events of May 28, 1960, on which date agent Theisen, who was at the bar section of the North Avenue Steak House, asked Carioscia whether he could pay Carioscia $2,300 of the $3,750 price for a quarter kilo of heroin and pay the balance in a few days. The Government concedes that Carioscia replied "he would have to talk to his man about it, *that the man was right there, and he pointed to the bar* • • •."

In their argument Government counsel avoid any reference to the difference between the foregoing accurate statement of Carioscia and the version thereof given by the Justices of the Court of Appeals who recited Carioscia's reply to Theisen as, he "would have to talk to 'his man' about it, and that 'the man's right *here*.'" The resulting effect of the two conflicting statements is argued in the petition at pages 12 to 15; the only answer of the Government to Petitioner's argument is that the matter was argued to the jury and was not significant in the light of the total evidence. The significance of the statement and its prejudicial effect is fully presented in the Petition at pages 12 to 15 and will not be repeated here.

2.

With respect to the conflict of testimony between Agent Durkin on one hand and Agents Taylor and Maxfield on the other hand regarding the occurrences at the Steak House on the evening of June 16, 1960, the Government answers Petitioner's argument by calling it a repetition of his attorney's arguments to the jury and that it really amounts to no more than an assertion that the jury should have resolved every issue of credibility in his favor. The arguments of counsel to the jury are not final and are not dispositive of the case. In its footnote to its argument (p. 7) the Government states that the jury evidently believed Durkin's testimony that he went to the inner entrance door and that he did not know if the other agents could see him since they would be looking through two thicknesses of glass.

Whether Durkin knew that the other agents could see him or not is not conclusive of the conflict of testimony between Durkin and two other agents. The conflict of testimony is not confined to whether Durkin stuck his head

out of the door; the more vital conflict is in the testimony of Durkin that he saw the Petitioner, William Wright, leave the entrance of the Steak House and walk over to an Oldsmobile, and that he saw Wright driving away in the Oldsmobile. However, Agents Maxfield and Taylor, who had the entrance of the Steak House under observation, did not see Wright leave the Steak House and drive away in the automobile.

Government counsel state that Durkin did not testify, as Petitioner states, that he put his head out of the door. The Oldsmobile, according to Durkin, was parked 40 feet to the left of the entrance of the Steak House as one entered, or 40 feet to the right of the entrance of the Steak House as one looked out. How could anyone see this Oldsmobile parked 40 feet from the entrance from the *inner* door? The angle would make it impossible. It could only be seen by one looking out of the *front* door and turning his head to the right.

The conflict of testimony is not between a Government witness and Petitioner's witnesses; it is between Government witnesses. The Government's position is the same taken by it in the case of *Jones* v. *United States*, 362 U.S. 257, 272, 80 S.Ct. 725, 737, in which the conflict was between the Government's testimony and the defendant's testimony. The manner of executing a search warrant was involved. The Supreme Court stated:

> "The trial revealed a direct conflict in testimony on this matter. We cannot yield to the Government's suggestion that we ignore that conflict and consider the question on the version of the warrant's execution given at the trial most favorable to the prosecution. We, therefore, vacate the decision of the Court of appeals and remand the case to the District Court to consider petitioner's contention under 18 U.S.C. §3109, in light of our decision that petitioner had standing to make it."

3.

The Government cites *Schaffer* v. *United States*, 362 U.S. 511, in answer to Petitioner's argument (pages 24, 27 of Petition) on the question presented:

> "Where the Government fails to prove beyond a reasonable doubt that the defendant was guilty of the conspiracy charged in one of the counts is it not error to deny a motion in arrest of judgment pointing out that there was a misjoinder of defendants in the ten counts charging independent substantive crimes committed by the four defendants?"

In *Schaffer* it appeared that each defendant did one or more acts with reference to the charge in each count. The situation is quite different in Petitioner's case and is like the situation recited in *McElroy* v. *United States*, 160 U.S. 60, 80, where the charges were not against the same persons, nor were they for the same act or transaction, nor for two or more acts or transactions connected together. They were substantive offenses, separate and distinct, complete in themselves and independent of each other, committed at different times, and not provable by the same evidence.

The telephone calls between some of the co-conspirators and Petitioner, the association of Carioscia and Petitioner may arouse speculation, conjecture and suspicion, but this is not evidence as pointed out by the attorney for Mr. Wright in his Petition.

Rule 8(b) of the Federal Rules of Criminal Procedure provides that two or more defendants may be charged in the same indictment "if they are *alleged* to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." The word "alleged" has definite meaning, and no such allegation as is required by this Rule appears in the instant indictment.

4.

Government counsel answer Petitioner's complaint with respect to the prosecutor's argument to the jury that the Government's testimony as to William Wright is unrefuted and undenied and that "Out of one hundred and seventy million people in the United States not one witness took the witness stand to refute the Government's case. Not from New York or anywhere *would* they come." (R. 527)

This argument was more than a mere reference that the Petitioner had offered no evidence to contradict that of the Government. This argument pointed out that there were witnesses in New York and elsewhere *available* to the Petitioner, and they were asked to "come" but refused. This analysis is not answered by Government counsel, who argue that the case cited by Petitioner, *Ginsberg* v. *United States*, 5 Cir., 1958, 257 F. 2d 950, is not in point. The Government disposes of *Ginsberg* by stating that it was an improper remark based upon *pure* conjecture and that Government counsel probably could have produced fifty witnesses to show that the defendant was not of good character, after defendant had introduced four witnesses. In Petitioner's case the argument was that "Not from New York or anywhere *would* they come" (meaning witnesses in behalf of Petitioner). This is all pure conjecture even more serious than that in *Ginsberg*. It pointed out by conjecture that Petitioner had witnesses "from New York or anywhere" but they wouldn't come to testify at the trial to refute the Government's evidence.

It is interesting to note that in *Ginsberg* the Court of Appeals held that the Government's argument constituted such plain error affecting substantial rights as may be noticed by the reviewing court, although not brought to the attention of the trial court.

5.

Government counsel argue that "other remarks" about which Petitioner complains were not objected to at the trial. At pages 27-29 Petitioner lists nine points of error, to some of which, it is true, no objection was made. However, an accumulation of errors is reversible. *United States* v. *Tomaiolo*, 2 Cir., 249 F. 2d 683, 695; *United States* v. *Donnelly*, 7 Cir., 179 F. 2d 227, 233. A court of review will note plain error to which objection was not made at the trial. *Screws* v. *United States*, 325 U.S. 91, 107; *United States* v. *Atkinson*, 297 U.S. 157, 160; *Brassfield* v. *United States*, 272 U.S. 448, 450; *Ginsberg* v. *United States*, 257 F. 2d 950, 954-955.

Respectfully submitted,

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